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Evidence

***8** OBJECTIONS AND OFFERS: TELL IT AGAIN, SAM

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When you cut to the chase, lawyers really do only two things in courtrooms: ask questions and make speeches. Persuasive lawyer talk is grounded on a theory of the case--a lawyer's explanation of why the client is entitled to a judgment or verdict. Even objections and offers of proof are, at their core, opportunities to argue the facts in an effort to persuade the judge to accept your theory of the case--the blueprint for evidentiary rulings in your client's favor.

Speeches about how specific evidence substantiates your theory of the case and negates your opponent's theory cannot be made often enough. You understand your theory, but the judge and jury will learn it only through repetition. In fact, the judicial system is littered with burial grounds of cases where a trial lawyer was afraid to "beat the dead one"--only to learn, post mortem, that the jury did not get the point.

What can we learn from this? When you object or offer to prove something, tell it again, Sam, tell it again.

Objections and offers of proof that are timely made, factually grounded, legally based, specifically stated, intelligibly presented, and persistently argued are the hallmarks of effective and persuasive advocacy. A well-stated objection or offer of proof constitutes the type of succinct presentation of a case theory that all advocates should make. (For a discussion on how case theory may be developed and then refined through trial exercises, including making and meeting objections, see Edward D. Ohlbaum, "Basic Instinct: Case Theory and Courtroom Performance," 66 Temple L. Rev. 1 (1993).)

Making and meeting objections is perhaps the most difficult of all trial skills to master--or even to perform competently. Opposing or proposing the admission of evidence often triggers a short, concentrated exchange that requires the advocate to resolve a trilogy of substantive, tactical, and technical questions: can I object, should I object, and if so, how do I object? Focusing upon the factual and procedural context and the governing law, trial counsel must argue succinctly how and why a particular fact, piece of evidence, or line of testimony advances, confuses, or prejudices the inquiry. It is a speech that invariably can be anticipated beforehand; it is a speech that will usually be heard by the factfinder, be it judge or jury. Prepare it, polish it, and deliver it accordingly. A well-phrased objection or offer of proof is not a demonstration in spontaneity. Like an opening or closing, it must be drafted, crafted, and tested in advance.

A trial lawyer attempts to accomplish four technical tasks by objecting: (1) preclude harmful information or conduct from prejudicing the factfinder; (2) preserve error in the record for review; (3) give the judge an

opportunity to dispel the prejudice; and (4) ensure that the same conduct does not recur.

The formal rules governing objections and offers of proof speak more to appellate counsel than to the trial lawyer. They tell the attorney when to object but not how. Even then, the rules are geared to preserving error for appeal, where an evidentiary decision will not be reversed unless the error involves "substantial" or constitutional rights. Because the rules are designed to ensure that verdicts are upheld, they give counsel a powerful incentive todo everything possible to resolve errors at trial.

The procedure for admitting and excluding evidence--the law governing objections--is set forth in Federal Rule of Evidence 103. Rule 103 obliges the trial lawyer to initiate the enforcement process by objecting "timely" or when error first becomes apparent. Where error is not called to the court's attention, any right to relief is waived. And although a court may consider "plain" evidentiary errors on its own initiative (see Fed. R. Evid. 103(d)) reversal for plain error occurs in civil cases only where the error is so serious and flagrant that it goes to the very integrity of the trial. United States v. Carson, 52 F.3d 1173, 1188 (2d Cir. 1995), cert. denied, 116 S. Ct. 934 (1996).

If there is no ruling, there is no error and, thus, no appellate remedy. And because evidentiary rulings usually consist of one word ("sustained" or "overruled"), it is the objection that tells a reviewing court what the trial judge actually decided. Consequently, objections must state specific grounds unless apparent from the context. Fed. R. Evid. 103(a)(1); see United States v. Burton, 126 F.3d 666, 671 (5th Cir. 1997); see also Fed. R. Crim. P. 52 and Fed. R. Civ. P. 61 (additional specificity requirements to preserve error in the court's instructions). ***9** For appellate purposes, a nonspecific or general objection may be as bad as no objection at all. United States v. Jamerson, 549 F.2d 1263, 1267 (9th Cir. 1977).

A general objection says nothing. It is the revenge of Hamilton Burger ("Ham" to his friends), the erstwhile prosecutor who was weekly whipped by Perry Mason. With fixed regularity, Burger objected that evidence was "incompetent, irrelevant, and immaterial." In raising that objection, Burger said just about everything there is to say about the law of evidence--and he said it badly. Evidence is not incompetent, though witnesses may be. "Irrelevant" and "immaterial" cover a spectrum of possibilities without any focus. And since 1975, materiality is not a separate ground but is part of relevance under Rule 401. By saying it all, Burger said nothing. Even worse, he signaled to the judge that he could not help the court navigate its way through the evidentiary quagmire, and he showed that the court risked little by ruling for Mason.

The sin of Ham has truly been visited on his sons and daughters. To earn the right to complain about trial rulings on appeal, trial lawyers must object timely, specifically, accurately, fully, and, when necessary, persistently. The rules are intended to penalize the gambler who would like to play now and complain later. If there is any conceivable valid basis for the evidence to have been admitted, there will be no appellate relief for one who raises only a general objection.

Even where objections are properly preserved, the chances of a successful appeal are, as the old joke goes, two: namely, slim and none. The time to win is at trial. While Rule 103 is a handy guide for appellate counsel trying to salvage or harpoon a trial record, it has about as much use for a trial lawyer in a courtroom as does a valentine for a heart surgeon in an operating room. Objection strategy should be devised and executed not as a preliminary exercise in the appellate process, but as a persuasive speech to a factfinder. The trial bar should heed the time-honored aphorism: Lawyers who try their cases with their eyes on the appeal will generally need one.

Disputes about the admissibility of evidence need not await trial. A motion in limine--three syllables and rhymes with jiminey--asks the court to rule on the admissibility of evidence before it is presented. The motion may be raised pretrial, prewitness, prespeech, or during an examination. It can address any type of evidence or presentation.

Motions In Limine

Although most motions in limine are commonly used to limit the other side from presenting evidence or argument

on a particular issue during the trial, they can also be used affirmatively. For example, a motion in limine might seek permission to display evidence during an opening; it might offer evidence that presents challenging foundational issues, such as computer graphics; or it might ask the court to "prescreen" evidence when the prospects for admissibility are questionable and trial strategy depends on knowing whether it will be allowed.

Whether a motion in limine adequately preserves error for appeal or whether the trial lawyer must again object at trial when the evidence is offered is an open question. Compare, e.g., Walden v. Georgia-Pacific Corp., 126 F.3d 506, 518 (3d Cir. 1997) (party need not object at trial if motion in limine set forth reasons and case citations and if district court made a "definitive" ruling), cert. denied, 118 S. Ct. 1516 (1998), with, e.g., Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1333 (8th Cir. 1985) ("[a] party whose motion in limine has been overruled must object when the error the party sought to prevent with the motion is about to occur at trial"). Given this uncertainty, counsel should assume that the court's ruling in limine is advisory and renew the objection at trial unless instructed to the contrary.

The motion in limine has several advantages. First, an advance ruling assists in developing trial strategy, which is significantly affected by the admissibility of evidence. An obvious illustration is the admissibility of a defendant's criminal conduct under Rules 609 or 608(b), which may well determine whether the defendant will testify, the strategies for questioning witnesses, and the overall theory of the case. Motions in limine also protect you from making empty promises. Advance rulings provide pretrial clarity and ensure that you neither make promises in your opening that the court will prevent you from keeping nor taint the jury with inadmissible and unfairly prejudicial information.

A motion in limine educates the court as well. It focuses the judge's attention on key evidentiary issues at the beginning of the trial and provides the judge with both an early warning system and an analytical framework for evidentiary issues that will arise during the trial. An advance ruling also cuts down on the need for continuing objections and reduces the necessity for cautionary instructions. Where evidence is excluded or admitted for only a limited purpose, it is less likely that the proponent will improperly use or refer to it if the court has already laid the ground rules. This approach is infinitely preferable to the kinds of cautionary instructions that judges routinely give and with which jurors predictably struggle--"don't pay attention to the ink in the milk" (i.e., ***10** "don't consider the defendant's two convictions as bearing on his character or likelihood to commit other crimes") or "don't think of pink elephants" (i.e., "ignore the references to the steps that the manufacturer took after the accident").

Despite their value, there are sometimes good reasons to skip motions in limine and take your best shot at trial. First, there is the surprise factor. Deferring evidentiary disputes until trial may catch your opponent off guard without a backup plan. Pretrial motions in limine may educate an opponent about foundations that must be laid or conditions that must be met. Even if successful, they may simply result in a wiser adversary asking the judge to reconsider the ruling during trial.

Moreover, your opponent may not have carefully considered the possibility that evidence may be admitted for a limited purpose, which will then affect the manner in which the issue may be argued. For example, Federal Rule of Evidence 613 permits counsel to impeach a witness with a prior inconsistent statement. If the statement does not also meet the requirements of Rule 801(d)(1)(A), counsel may not argue that the contents are true. If your opponent steps over the line and the court sustains your objection with a cautionary instruction, it may devastate your opponent's examination or speech. Such tactical advantages may be lost if the evidentiary issue is raised before trial or is otherwise considered outside the hearing of the jury.

Objections and offers of proof are two sides of the same coin. Just as an objection preserves errors in admitting evidence for review, an offer of proof preserves errors in excluding evidence. An offer of proof is the trial lawyer's way of telling the trial court about the nature and often the details of the evidence to which an opposing party has objected. It is an attempt to persuade the court to admit the evidence or to change the court's mind if it has already ruled. An offer of proof enables the opponent to make an intelligent decision whether to insist upon the objection, apprises the judge of what is at stake in a ruling, and provides a record sufficient for appellate review. Offers of proof come in various forms--written statements, affidavits, summaries, or live question-and-answer presentations.

The court may permit cross-examination of the witness on the offer of proof or may give the objector the opportunity to make an offer of contradictory evidence.

Both objecting and proffering inevitably invite the advocate to discuss the purpose or relevance of the evidence in question. To persuade the judge to exclude or include evidence, the trial lawyer must summarize the projected proof, its evidentiary basis or lack thereof, and, most importantly, its projected impact on the case. Stated another way, both objections and offers of proof summon the trial lawyer to present the case theory as it relates to the evidence that is subject to scrutiny. Although cast in the context of legal argument, objections and offers provide trial counsel with opportunities to argue facts in an effort to persuade the judge to accept the lawyer's theory in making evidentiary rulings. It is the trial lawyer's opportunity to make a speech about how specific evidence substantiates the lawyer's case theory and negates the case theory of the opponent.

Whether through an objection or offer of proof, the trial lawyer attempts to shape the case--the testimony and the evidence--for the factfinder. To be sure, offers and objections provide trial counsel with a chance to participate in a discussion during which evidentiary disputes are raised, reviewed, and resolved.

Making and meeting objections are also opportunities for trial counsel to introduce herself to the judge as an advocate who is familiar with the law, respectful of the court's responsibility to control the gates of admissibility, and ready to help the judge in defending evidentiary determinations. Trial lawyers should show the judge that the court is in good hands: "Judge, I know the evidence. I will not mislead you. You can rely on me. I will help you protect this record." Regardless of whether the evidence is admitted or excluded, judges and juries will assess the trial lawyer and the strength of the case based on the way counsel objects.

The technique for persuasive objections and offers of proof has seven steps.

First, in ordinary language and citing the rule or statute where appropriate, counsel should state the objection and its legal basis or state why the other side's objection is incorrect and give the grounds for admissibility. Second, counsel should summarize the disputed evidence. Third, counsel should apply the facts to the law and explain why the evidence is objectionable or admissible. Fourth, counsel should describe what other admissible or inadmissible evidence may be offered, depending upon the court's ruling. Fifth, counsel should demonstrate how the evidence unfairly helps the other side or how the evidence is fair to all parties. Sixth, counsel should provide the ***11** court with copies of authority, if needed and if available. Finally, counsel should request specific relief--usually the admission or exclusion of the evidence at issue.

As an example of this technique, consider one of Hollywood's hall of fame trial movies, Anatomy of a Murder. In that film, Army Lieutenant Frederick Manion is prosecuted for the murder of a local saloon keeper, Barney Quill. The State contends that Manion killed Quill because Quill slept with Manion's wife. Manion defends on the grounds of irresistible impulse: He was unable to control his rage when he learned that Quill had raped his wife. Manion is acquitted, fails to pay his lawyer, and the movie ends. Now for the imaginary postscript. (The following adaptation is based on the mock trial file, Sharon Rogers v. NITA State Attorney's Office, written by Judge Jerry R. Parker, Second District Court of Appeal, Tampa, Florida, for the National Trial Competition in 1991.)

Assume that after his acquittal Manion beats his wife and threatens her with Quill's fate if he catches her looking at another man. Manion is arrested, charged, jailed pending bail, and given a court martial date. Against the advice of the judge advocate, Mrs. Manion visits her husband in jail and speaks to him on the phone. Manion tells her it would be in her best interest to withdraw the charges. She declines. He sends her life-threatening letters that she turns over to the prosecutor.

As Mrs. Manion enters the military complex en route to a pretrial hearing, Manion, having made bail, intercepts her and threatens to shoot her if she remains. She leaves. Later, she informs the prosecutor, who promises her that she will be safe the next time. She reappears in response to a subpoena and is promptly shot by her husband on the courthouse steps. She recovers from her injuries and sues the Army for negligently placing her in a dangerous situation without proper security. Its constitutional objections having been denied, the Army asserts that she

assumed the risk.

How to Object

In her direct examination, Mrs. Manion testifies that when she arrived at the complex in response to the subpoena, she was met by her husband:
Q: Did he say anything to you?
A: Yes. He said that I wasn't getting into the courtroom unless I killed him first.
Q: So what did you do?
A: I panicked. Then I ran.
Q: Did you expect to find your husband waiting for you at the courthouse?
A: No. Two days before the hearing Major Baker of the county sheriff's office notified me that...
Def.: Objection, your Honor, hearsay and relevancy--and if argument is to be made, may it be done at sidebar?
Court: Yes. Counsel may approach.
Def.: The sheriff's office is not a party to this lawsuit; thus Major Baker's statements are hearsay. Moreover, any information that Major Baker provided to Mrs. Manion about action taken in her husband's criminal case is not only prohibited by the hearsay rule but is also irrelevant to the only question in this case--whether the Army behaved reasonably towards the plaintiff. Finally, statements made by Lieutenant Manion's jailers, who constitute an independent agency in the criminal justice process, are unfairly prejudicial to the office that prosecuted him.
Pl.: Your Honor, if permitted to testify, Mrs. Manion will state that Major Baker told her that Lieutenant Manion was in jail pending his trial. These statements are not offered for their contents or their truth but to show the effect they had on Mrs. Manion. They are relevant because they explain why she believed her husband was in jail and consequently did not ask for an escort to the courthouse. They also show why she later had no confidence that the Army could protect her.

Too often, the objection/offer dialogue sounds much like Groucho Marx's old game show, You Bet Your Life. Lawyers, like contestants, hope to say the secret word, the talismanic phrase, the buzzword, the ritualistic incantation that will strike a familiar chord with the bench and make a favorable ruling magically drop down from above. See, e.g., United States ex rel. Burgos v. Follette, 448 F.2d 130, 131 n.1 (2d Cir. 1971) (courts show partiality for plain speaking rather than talismanic phrases that may demonstrate no more than "mere sophistry"). Even where the objection is successfully made or met, the chorus has left the jury tone deaf and the judge looking for additional accompaniment.

So try to emulate both lawyers in the hypothetical above. First, object by stating "Objection." It certainly removes any ambiguity about what you mean and what you want. A federal judge taught me that word economy, if not a virtue, at least minimizes embarrassment. After my opponent posed an objectionable question, I stood and stated: "Your Honor, I'd like to object." His Honor responded: "That's thrilling, Mr. Ohlbaum. When you do I will rule on it."

Point made: Just object. Do it confidently, assertively, and directly. Shy away from, "I must object"--you really don't have to. Nothing in the law obligates you to object unless you want to preserve error. Avoid the temptation to confess, "I fail to see how that's relevant," or to inquire, "How is that relevant?" Now is not the time to acknowledge how much you do not know or to invite your opponent to demonstrate how much she does.

State the basis of objection--in humanspeak where permitted--unless the grounds are apparent from the context, and provide the rule where necessary. By objecting, you necessarily place yourself at odds with the audience of factfinders. You have interrupted the play--at a moment of interest, if not of drama--and have indirectly advertised that there is evidence that you would like to keep the jurors from hearing. Courts often instruct juries to pay no mind to objections, and some jurors will try to follow this directive. They will be about as successful as they are when they are asked to disregard the defendant's criminal history in assessing whether "he did it--again." So if you must interrupt the proceedings, ***12** it is well worth taking the trouble to communicate to the jurors why you are doing so. Do not squander the opportunity to retell at least part of your story and to restate your theme during the

objection/offer colloquy.

For an example, consider the cross-examination of Lieutenant Manion in Anatomy of a Murder:
Q: How many men have you killed?
Def.: Objection, now wait a minute, Judge. A man's war record--in this case a great war record--should not be used against him--and has nothing to do with this case.

Of course, in the film the prosecuting attorney was every bit as effective at offering a rejoinder that succinctly stated his point:
Pros.: I'm as patriotic as the next man, but it was the defendant who claims that he was confronted by circumstances in which he was powerless to resist. The simple truth is that war can condition a man to kill other men. I simply want to determine how conditioned the Lieutenant was to use firearms on other human beings.

Technical jargon will distance you from the jury. Objections must be specific, but they need not be unintelligible.

Some trial judges sit poised and ready to gong the lawyer who says anything more than "Objection." The better ones will let you at least state the basis for your objection. Where the court permits the short sound bite, counsel should give voice. Here are examples of effective ways to phrase some of the more popular "speaking objections":
. Competence (i.e., your expert's competence): "The question requires Dr. Jones to go beyond his expertise."
. Hearsay: "She's asking the witness to repeat a statement made by someone whose credibility this jury cannot evaluate."
. Irrelevance: "That has nothing to do with what this jury has to decide."
. Leading: "Counsel is testifying for the witness" or "putting words in the witness's mouth."
. Speculation: "He's asking the witness to guess. Witnesses are supposed to tell us what they know."

Objections to Avoid

On the other hand, some "speaking objections" and "offers" should be avoided at all cost. Here is a selection from my index:
. "Objection, the answer will prejudice the jury."

If it would not have done so before the objection, bet the ranch that it will now. If nothing else, the jury will understand that the objector believes that devastating evidence is being offered against him. And the objection is legally unsound--it is your opponent's job (and yours too) to offer evidence that prejudices the other side. That is what we are paid to do, and a public acknowledgment that your adversary has succeeded provides no basis for relief. Evidence may not be excluded merely because it is prejudicial; it may be excluded only if it is unfairly prejudicial and if that unfairness substantially outweighs its probative value. See Fed. R. Evid. 403.

An objection under Rule 403 concedes that the evidence is relevant and thus shifts the burden--the very heavy burden--to the party seeking to exclude it. The bottom line? Object on Rule 403 grounds as a last resort at the end of your objection speech and never in front of the jury.
. "Objection, Judge, the document speaks for itself."

Doesn't that sound silly? Documents don't speak; people speak--unless you have gone high-tech with CD-ROM and a computer program that gives a larynx to a deposition transcript. The phrase invariably comes up when counsel asks the witness to read from a document, point out items in a picture, or confirm that a writing does or does not contain a fact. The objection is most often a misapplication of the original writing or "best evidence" rule, which requires that where the contents of a writing are material, the writing must be produced or read and not introduced through a witness's or counsel's summary or editing of the contents. See Fed. R. Evid. 1002. If you have a good objection under that rule, make it. But don't give the jury lawyerspeak about talking papers.
. "Judge, this is not offered for the truth of the matter asserted."

We use that all the time. It is taken verbatim from Rule 801's definition of hearsay. We teach it in law school. And it is correct. So what is the problem?

Read it again. Only a lawyer could have written that sentence; only a lawyer can understand it. Most people hear "not offered for the truth" and wonder why counsel is developing something that is untrue. Is that the sort of mystery you want to have jurors pondering?

Responses to hearsay objections should be phrased in the affirmative. Rather than telling the judge what the evidence is not offered to prove, explain why you want it in--for example, to show the effect that it had on the plaintiff, how she relied upon the defendant's words and phrases, and so forth. Then and only then, to round if off with the rule's language, you might add, "and not offered for its specific contents."

Sidebars present their own set of problems and opportunities. The necessity for sidebars is no mystery. Objections and offers are, at their core, opportunities to argue facts. Those arguments often take place before the jury in the heat of battle. When they do, and when they are unregulated, they provide opportunities for one side or the other to make speeches about the very proposed evidence that has prompted the argument and that the judge may rule inadmissible.

In recognition of this fact of trial life, the rules permit sidebar discussions out of the presence of thejury for those offers of proof that refer to evidence of questionable admissibility. More specifically, Rule 103(c) provides that such offers of proof can be made outside the presence of the jury to prevent, to the extent practical, "inadmissible evidence from being suggested to the jury by any means." The jury may be excused, the court and counsel may retire to chambers, or counsel may approach the bench.

***13** Once you are out of the jury's presence, however, there is nothing wrong and everything right with speaking objections and offers of proof that provide through the back door what the court has the discretion to bar through the front. So when you get to sidebar, do not hold back. Use it as an opportunity to present your position as fully as possible. There isn't a judge alive who fears that he or she can possibly be tainted by anything a mere lawyer has to say.

As an illustration, return to Mrs. Manion's negligence trial against the Army. Assume that when arrested, Lieutenant Manion was searched, and a second gun and switchblade knife were recovered. Defense counsel objected to the admissibility of both items in a motion in limine, but the court has not yet ruled. Here is a sidebar where both lawyers are arguing in a professional manner, but with presentations that would be highly improper--or ill-advised-- if the jury were present.
Def.: Objection, Your Honor. Counsel is attempting to elicit testimony about the gun and the knife that were taken by sheriff's deputies from Lieutenant Manion. These are the items I asked the court to exclude at the beginning of the trial. The gun and knife are irrelevant. Manion neither used nor threatened the plaintiff with the knife or the second gun. Because she did not know that he was carrying them, they cannot explain her behavior. Moreover, carrying a concealed weapon may be evidence of an unrelated criminal act and is therefore not only irrelevant, but, absent a relevant purpose, specifically barred under Rule 404(b).
Pl.: The fact that Lieutenant Manion was permitted to enter the courthouse, confront his wife, and assault her while carrying a gun and switchblade is an additional indication of the negligence of the defendant. The failure to institute a system that would detect the presence of weapons is proof of the negligence of the Army.

Note that both of these presentations are succinct and specific.

Now assume that in later testimony Mrs. Manion describes her husband's abusive behavior and refers to letters that she received and that she claims were written by him. Unless the letters were the subject of a motion in limine, the following dialogue might occur:
Def.: Objection. These letters are hearsay. They are also irrelevant. The Army neither received the actual letters nor were they informed of their specific contents. Finally, they contain the type of threats that will only serve to inflame and prejudice the jury.

Pl.: Your Honor, these letters constitute the actual threats made by Lieutenant Manion to his wife--what he would do to her in the event she came to court to testify against him. They are not hearsay because they are not offered for their truth. They are relevant for two independent purposes. First, when Mrs. Manion told the defendant about these letters, she put the Army on notice of her husband's violent nature and the risk of violence that he posed to her. The failure of the defendant to take any action as a result of these letters constituted negligence.
Court: Let's take that one separately. Do you have a response, counsel?
Def.: Judge, Mrs. Manion will admit that she did not provide the prosecutor or anyone at the Army with the letters. Unless she can testify that she read the letters, verbatim, to an Army representative, they do not provide notice. Notice is what the listener was told.
Court: Counsel, I believe you had a second argument for admission?
Pl.: Secondly, Your Honor, the defendant has raised the defense of assumption of the risk. It claims that Mrs. Manion contributed to her own injuries. These threatening letters illustrate the extent of the threats and risk of violence that she faced and explain why she chose not to do anything to further provoke her assailant when initially confronted.
Def.: Your Honor, one of these letters, exhibit C, was not written or given to Mrs. Manion, but was received by her father-in-law, who is unavailable to testify. The failure to establish a chain of custody requires the jury to speculate as to its writer and the conditions under which it was received and makes this exhibit unreliable and unfairly prejudicial.
Pl.: This letter was given to Mrs. Manion by her father-in-law, who told her that he had received it in its present condition from his son. Neither the letter nor his statements are admissible for their truth, but they are admissible to explain why Mrs. Manion took the action she took in arming herself when the defendant demonstrated it was incapable of protecting her and in choosing not to physically resist her husband inside the courthouse lobby. Moreover, the failure of the Army to obtain the letters from Mrs. Manion is a further demonstration of their negligence. Their lack of effort in obtaining them and reading them should not be rewarded by suppressing them.

That lawyers arguing over admissibility often deliver what have been branded mini-closing arguments is not only understandable, it is also what the decisional law requires and the rules of advocacy encourage. Notwithstanding the absence of a specificity requirement in Rule 103(a)(2), counsel making an offer of proof is obliged to state the specific grounds for admissibility, just as Rule 103(a)(1) requires her to state the specific grounds when objecting.

Appellate courts have more often admonished trial counsel for saying too little than too much. Repeatedly, counsel have been cautioned not to assume that the court is familiar with the theory and to err on the side of full rather than limited exposition. See, e.g., Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 174 (1988); Reese v. Mercury Marine Division of Brunswick Corp., 793 F.2d 1416, 1421 (5th Cir. 1986). See generally United States v. Santos, 932 F.2d 244 (3d Cir.), cert. denied, 502 U.S. 985 (1991); United States v. Madruga, 810 F.2d 1010 (11th Cir. 1987); ***14**Reese v. Mercury Marine Div. of Brunswick Corp., 793 F.2d 1416 (5th Cir. 1986); United States v. Garcia, 531 F.2d 1303 (5th Cir.), cert. denied, 429 U.S. 941 (1976).

In United States v. Garcia, for example, the United States Court of Appeals for the Fifth Circuit reminded trial lawyers that the "offer of proof" is more than a recitation of the questions to be asked and answers expected. It is the forum to fully "articulate [the] theory as to the admissibility of the evidence." In Garcia, defense counsel sought to cross-examine the government's "confidential informant" about a pending charge against him initiated by the DEA agent for whom the informant was working. The Fifth Circuit found that counsel's references to "bias and prejudice" did not satisfy the requirement that counsel "articulate his theory as to admissibility" of the evidence.

Even where the court has demonstrated reluctance to hear from counsel or has cut off counsel's remarks, trial lawyers have been found derelict for failing to make their objections clear and specific. E.g., United States v. Bernal, 814 F.2d 175, 180 (6th Cir. 1987) (attorney reprimanded for general objection even where court cut off his objection by saying, "Why don't you wait until after?"); American National Bank & Trust Co. v. Aetna Insurance Co., 447 F.2d 680, 683 (7th Cir. 1971) (counsel has duty to press and insist upon objections at risk of displeasing trial court).

Your objection strategy and technique should be tailored to the particular case, the specific item of evidence, and

what you are trying to accomplish. But whatever your strategy, it is vitally important to know and to play by the court's rules.

A judge may have a particular protocol for objections. Some want to hear "Objection" and nothing more. For them, it is "speak only when spoken to." Others run their courtrooms like New England town meetings where rulings follow the pattern of "I'll let it in for what it's worth." Some judges discourage sidebar conferences. Others make quick rulings.

Protocol

But there are some rules that seem to apply no matter where you are or who is presiding:
. Do not address your opponent directly. All argument and responses should be directed to the court.
. Watch the judge and listen carefully. When the court invites you to object, accept the invitation. Pay careful attention to the judge's language--body as well as verbal. If the judge says to you, "Counsel, is there any other basis for objection?" think hard and quick and offer one. You are being asked to do so, and the judge probably has one in mind.
. After your opponent states her position, stand to signal that you have a response, and ask to be heard.
. Do not ever thank the judge for ruling. If you thank the court for sustaining your objection, you will appear to be digging for brownie points. And you may hear, "Don't thank me, counsel, I'm just doing my job. Please continue to do yours." If you thank the court for overruling your objection, you may suggest that you are clueless: "Counsel, I just ruled against you, didn't you understand that?" Worse, you may seem to be expressing contempt: "Gee, Judge, thanks for nothing."
. After you lose an objection--and you will since the only lawyers who do not lose objections are those who never make them--be careful not to mutter to co-counsel or to laugh, smile, groan, scowl, grimace, or otherwise demonstrate (willfully or otherwise) how you feel about the ruling. If the judge is insecure, that will most likely surface in connection with rulings on objections.
. Do not withdraw an objection after you lose it. It sends the wrong signal to the court and undermines your credibility as an advocate. Are you suggesting that your objection was frivolous or specious, and now that the court has caught you, you want to set the record straight?

Be sure to consider the jury's reaction before raising your objection. If the anecdotal evidence is correct, jurors put objections in the same category as medicines: They don't necessarily like them, but they recognize the need for them and they will not hold their administration against the doctor as long as they are used only when necessary. The key is giving the jurors some idea why your objections are necessary. If you do not, the cure may become worse than the disease. Respect your jurors' intelligence.

Watch your adversary's performance. Consider whether you can accomplish more by objecting or by letting him play on. By strategically foregoing opportunities to object, you may be able to return later to replay your opponent's evidentiary mishaps.

Consider leading questions, for example. Unless special circumstances dictate otherwise, one may not lead on direct examination. Fed. R. Evid. 611(c). It is the witness, not the lawyer, who has firsthand personal knowledge; it is the witness, not the lawyer, who is supposed to testify. So when your opponent leads her own witnesses, you can object. But before you do, think about what might happen if your opponent continues to lead the witness without objection. You may be able to use the questions and answers to your advantage in summation:
Members of the jury, do you remember counsel's examination of Lieutenant Manion, his own witness? Do you ***73** remember how he put words in his mouth, basically testifying for him? What does that tell you about Lieutenant Manion's knowledge of what happened and, as importantly, what does it tell you about counsel's confidence in what Lieutenant Manion had to say? If his own lawyer doesn't trust him, why should you?

Do not object if your triumph might result in teaching your opponent how to make his strike cleaner and sharper. For example, unless there are different answers to each question, do not object that the question is compound. Why

give counsel the opportunity to bring the harmful responses out one by one? There is no death as painful for the trial lawyer as death by slow disclosure. And unless the repetition becomes unbearable, resist the urge to object that a question has been asked and answered. No rule specifically bars repetition, and in key areas--where the objection is most likely to arise--the court is more apt to permit clarification than to curtail evidence because it is cumulative. What is more, the jury is going to listen more closely precisely because you objected. Likewise, a successful objection to the foundation for a lay opinion might remind counsel to ask about the underlying facts, which will invariably be more persuasive than the conclusions to which you objected.

Objections must be gauged, guided, and governed by the theory of the case. Always ask yourself, "Does my theory require the exclusion of this evidence?" If the evidence does not hurt, do not object. Ask yourself, "If the evidence comes in, can I handle it?" If so, do not object. Ask yourself, "If an objection is sustained, will the evidence come in elsewhere, perhaps in a more persuasive way?" If so, do not object.

Objections and offers of proof are part of a bigger picture--convincing the factfinders that your side should win the trial. They are not mind games or academic exercises. They are, at their core, exercises in persuasive speech-making. Like the laser, their devastating effect will be proportional to their focus and force.

One of the best offers of proof ever delivered comes from another classic litigation film with a military twist--The Caine Mutiny. The book, the play, and the film all tell the story of the court martial of two naval officers for mutiny during a typhoon at sea. Their defense is that their captain, Lieutenant Commander Queeg, was deranged. Defense counsel Barney Greenwald's offer of proof during his cross-examination of Queeg combines all the elements of legal reasoning and persuasive speech:
Court: A word of caution before you proceed with your examination, Mr. Greenwald. The court recognizes that the defense is compelled to try to challenge the competence of Lieutenant Commander Queeg. Nevertheless, all the requirements of legal ethics and military respect remain in force.
Q: Thank you, Sir. Now on the morning the Caine escorted attack boats of marines to the beach, did your orders include dropping a yellow dye marker?
A: I don't recall.
Q: Did you drop a yellow dye marker?
A: I don't recall.
Q: Now, Captain, didn't you steam several hundred yards ahead of the attack boats, drop a yellow dye marker and retire at high speed, leaving the boats to make the beach on their own?
Pros.: The question is abusive and flagrantly leading.
Court: Mr. Greenwald, there can be no more serious charge ***74** against an officer than cowardice under fire.
Def.: Sir, may I make one thing clear? It is not the defense's contention that Lieutenant Commander Queeg is a coward; quite the contrary. The defense assumes that no man who rises to command a U.S. naval ship can possibly be a coward and that, therefore, if he commits questionable acts under fire, the explanation must lie elsewhere.
Court: You may resume your examination.

Spectacular! If I could do that as effectively as Greenwald, I might even give up tenure to resume my career in the courtroom--telling it again, Sam, and telling it again.

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